Docket No. 14801

In the United States Court of Appeals for the Ninth Circuit

BILL CORBETT, Appellant

v.

UNITED STATES OF AMERICA, Appellee

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

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The brief for the Government in this Court follows the same tactics used by counsel for the Government at the trial: namely the glossing over of failures of proof by continued positive restatement of incorrect generalizations as to the facts and by stressing collateral matters as showing bad intent. These tactics, accompanied by the introduction in mass exhibits of hundreds of documents which, without specific testimony so establishing, were totaled as omitted income, concealed not only to the Court and jury below, but to defendant's trial counsel as well, the failure of proof and impropriety of evidence involved. The Government here even attempts to use this fact as an argument in its favor (Gov't. br. 27).

I

Government Failed To Prove Unreported Income

Perhaps the most vital of the incorrect generalizations in the Government brief is the constantly reiterated statement that "the Government proved $14,959.84 in 1945 and $17,542.83 in 1946 specifiically as being false claims for bills that had actually been paid." (Gov't. br. 28: see pp. 13, 33, 43 and also p. 8 where the totals of allowance slips introduced, before deducting even those restorations of income testified to by Marx, are stated to be reductions of income). No attempt is made by the Government to give a detailed answer to the careful analysis in our opening brief of the evidence on this point.

The point at issue is the amount of allowances proved beyond a reasonable doubt to have been received by defendant rather than actually given to guests or employees. The Government's brief by generalizing testimony attempts to infer that all the allowances were for the entire amount of the bill (Gov't. br. 7). The evidence referred to was simply general testimony as to what sometimes happened and had no reference to any particular allowances. That a large proportion of the allowances were not of the entire bill is disclosed by examination of the ledger sheets in evidence. Moreover, there was testimony that legitimate allowances of the entire amount of the bill were given (R. 388-389, 787, 884-885, 906-909).

The Government brief (p. 9) states that prior to trial

Morgan, Krueger and Newton "went through" those guest ledger sheets that were in the possession of the agents and segregated those that they could identify by entries in their own handwriting. However, the fact is that Morgan identified only the few items shown in exhibit 13 and summarized in Appendix B of our opening brief; Krueger identified the few allowances shown in exhibit 14 as in her writing, but testified she did not know whether the guests received the allowances (R. 213); and Newton's testimony as to exhibit 15 was that the agent segregated them and showed them to her and she examined "several". (R. 398-399).

The Government brief (pp. 9-10) states:

> "Segregation of ledger sheets and allowance slips were also made by Mr. McCarthy, an Internal revenue agent, of those instances where an entire bill was given as an allowance, where the cash entry was erased or no entry at all made, and where allowances corresponded in amount to checks deposited in bank accounts the following day (R. 748-750). These, in addition to exhibits also identifiied by other witnesses, were Exhibits 16, 72A, 72B, 72C, 73A, 73B and 73C (R. 108, 753-757)."

The fact is that McCarthy testified he sorted ledger sheets into various categories— (1) where allowances were made for entire bill, (2) where there were erasures, and (3) where there were pink slips but no writing on guest ledger sheet (R. 748-749). These ledger sheets were

not put in evidence with this "sort", however. In fact, McCarthy immediately stated that he had consolidated the documents where allowances were of the entire bill with those where ledger sheets showed erasures. (R. 749). Further, he testified that he had taken these and made another "sort" just before trial (R.749). This segregation was to associate ledger sheets with pink slips in the cases of sizable allowance slips where no writing appeared in either the cash or allowance column of the ledger sheet and further in cases where the entire bill had been allowed (R. 753). Also, he corrected himself by saying that he had not personally made all of these segregations, he had directed that it be done by persons in his office (R. 749). He also was assisted in doing this by former agent agent Marx and by Government counsel Obenour (R. 754). Actually, he himself did not make the segregation but the documents were segregated and attached and handed to him (R. 754).

All of this testimony was in general terms not having any stated relationship to any particular exhibit either offered or about to be offered. McCarthy then testified, with apparent reference to bunches of documents about to be introduced which had not been marked, that the documents were segregated by years "as to allowances being given where no writing appears on the ledger sheet, where the full amount of the bill has been given by allowance", and in some instances also "where cash appears in the cash column but no allowance has been made." (R. 755). Three bunches of documents were

then marked as Exhibits 72-A, 72-B and 72-C and admitted (R. 755-756).

McCarthy stated there was another segregation (R. 756). Three additional bunches of documents were then marked as exhibits 73-A, 73-B and 73-C and admitted without further testimony as to their nature except that they were obtained from defendant (R. 756-757).

From this testimony it is impossible, we submit, to ascertain exactly what the ledger sheets and allowance slips so introduced were supposed to establish. We cannot tell from the testimony which manner of segregation applies to the exhibits introduced nor can we tell whether McCarthy's testimony applies to exhibit 72 only or to both exhibits 72 and 73. There is in this "identification" by McCarthy nothing to show beyond a reasonable doubt that the guests did not receive the benefit of the allowances shown in the documents.

As we pointed out in our opening brief, a large number of the ledger sheets introduced which do show allowances are of the nature of credits on the accounts of long staying guests not occurring at the time of checking out. These are the type testified to by guests Cole and Beers who received large allowances reducing their charges to what they understood to be O. P. A. ceilings. (See R. 873-879).

Another example of the type of incorrect generalization which the government used at the trial is shown on pages 12 and 13 of the Government's brief. After referring to testimony of Bauman introducing a few fumed cash sheets, the Government quotes Corbett's testimony that with his

help they could have gone through all the cash sheets of the hotel for these years in less than a week and picked out all cash sheets that had eradications on them. Then the brief immediately states (p. 13);

> "Special Agent Holtberg computed these allowances from exhibits 13, 14, 15, 16, 17, 46, 49, 51, 55, 60, 72 and 73 and they totaled $14,595.84 in 1945 and $17,542.83 in 1946."

This gives the impression that the government had established erased cash sheet entries for all of the allowances shown on all these exhibits, when nothing could be further from the truth. Bauman showed 19 cash receipt entries which had been altered and which tied in with allowances. Corbett's statement that he could have examined all the hotel's cash sheets for these years in a week and picked out all the cash eradications which tied in with allowances does not establish what further number there would have been, if any.

The Government brief states (p. 20) that Marx compared the allowance slips in exhibits 72-A, B and C with deposit tickets and found checks in the same amount as allowances in a total of $18,000 in 1945, 1946 and 1947. He did not so state. He stated only that the totals of 72-A, B. and C were $8,255.76 in 1945, $4,431.87 in 1946 and $3,314.24 in 1947, saying nothing about finding any identical check deposits (R. 772).

In discussing Newton's testimony concerning exhibit 15 the Government (br. 28-29) admits that Newton did

not testify concerning all the allowances in exhibit 15 but only some particular ones. Nevertheless the government goes right on to say that each sheet (in exhibit 15) contained an improper allowance and only these improper allowances were included in the government computation, despite the fact that there was no testimony establishing that any of these allowances were improper except the particular ones mentioned by Newton.

There is, we submit, no refutation of the point made in our opening brief that there was not testimony here from which it could be held beyond a reasonable doubt that Corbett, and not the guests or employees, had received the benefit of allowances except to the extent of $803.69 in 1945 and $2,756.98 in 1946 (before dealing with Marx's testimony as to check deposits matching allowances in exhibits 73-A and B). The only new item of proof brought out in the Government brief which would affect these figures is that $100.00 should be added in 1945 for the store rental mentioned on p. 11 of the Government brief (R. 407, 453-454).

In several places the Government brief argues that the O.P.A. could not have been the reason for manipulation of defendant's records because his application for an increase was stamped "approved—Sept. 2, 1944". This ignores Corbett's own testimony that the application had been held in the O.P.A. offices until 1946 and did not come to light until a Federal District Court injunction suit was brought against him in 1946, at which time he told them

he had filed an application two years previously and they found it in the O.P.A. offices (R. 1006-1007).

Concerning the night rentals by Vowles omitted from the income records, the Government concedes that these were entered in income while Corbett was away in 1945 and 1946 (Br. 32). These trips apparently were lengthy, as pointed out in our opening brief (p. 20). This fact, alone, shows conclusively that the testimony of Holtberg, both by exhibit and orally, as to the income of defendant was erroneous and did not truly reflect the Government's own evidence. Holtberg included the night rentals as computed by Marx, who included $20 per night for every night from July 1, 1945 to December 31, 1945, and every night during the entire year 1946 (R. 777).

Beyond this, however, as developed in our opening brief, the entire use of $20 per night is improper in light of Vowles testimony as to his $7,200 written record. The Government brief states (p. 32):

> "The Government used the minimum figure given as his average, of $20 per night. This is substantiated by the testimony of the other clerks who all saw these receipts given to Corbett by overages or envelopes."

No record citations are given to support this statement, which is understandable because no one other than Vowles testified as to the amount of the night rentals, and the $20.00 figure was unsupported by anything other than his estimate.

Another example of the same tactics is found on the same page of the Government brief (p. 32). Following the statement that "Vowles said he rented from one to seventeen rooms every night," the Government brief states:

> "In addition he rented fifteen cots to servicemen for $1.00 each. (R.609). All of these receipts were omitted from the cash sheets and given to Corbett (R. 609)."

This statement can only be taken as meaning that Vowles received $15.00 every night from rental of cots to servicemen which was unreported. Vowles' actual testimony concerning the number of cots was (R. 609):

> "At one time we had fifteen."

There was no testimony as to how many cots were actually rented.

Concerning the restorations to income, the Government states there is nothing to support our contention that there was $200.00 restored to the cash sheets and $410.00 to the cash received journals in 1945 above Marx's figures (Br. 33). These are shown by entries in the exhibits themselves as set out in our opening brief (pp. 13-14). Also objection is made to our inclusion as restoration to income of the amounts included on the returns as wagering income (Gov't br. p. 34). The objection is that defendant was vague in describing it. However, Corbett had described it to the accountant at the time as "Cash Over", the same

description as the other restorations to income, and this still appeared in writing on the original work sheet (R. 683-684).

With regard to Marx's testimony purportedly based on Bank of Calfornia deposit tickets in evidence, which we pointed out in our opening brief were not in evidence, the Government contends that the tickets were present in boxes in the Court Room although not introduced in evidence. There is nothing to establish this fact in this record. The brief argues that defendant should have objected to Marx's testimony. But where a revenue agent gives the Court to understand that his statements are based on documents in evidence, the defendant cannot be required to assume the untruth of this statement and stop the trial and examine all the exhibits at the peril of otherwise waiving his objections to the incorrect testimony. The burden is on the Government to establish its case by competent evidence beyond a reasonable doubt.

The Government cites *Stevens v. United States* (C.A. 6), 206 F. (2d) 64, 67; *Augustine v. Bowles* (C.A. 9), 149 F (2d) 93, 96, 97; *United States v. Mortimer* (C.A. 2) 118 F. (2d) 266, 269; *Cooper v. United States* (C.A. 8) 9 F. (2d) 216, 223, to support argument that summaries of documents not introduced are proper where the documents themselves are presented to counsel for defendant and made available for introduction and for cross-examination. See also on this point *Wilkes v. United States* (C.A. 9), 80 F. (2) 285, 291 and *Willapoint*

Oysters v. Ewing (C.A. 9),174 F. (2d) 676, 691. None of these cases involve a situation where the government witness caused the Court and counsel to believe he was merely summarizing the exhibits already in evidence. In all of these cases attention was called at the time to the unadmitted exhibits being summarized and the exhibits were then made available to defendant's counsel for cross-examination and to introduce if desired. For example, in the *Augustine* case the trial court continued the trial for a week to give defendant time to examine the summarized exhibits. Here there is no showing in the record that the documents being summarized were available and even if they were, no opportunity to examine them in connection with this testimony was given because the witness did not purport to summarize anything except what was already in evidence.

As to the 1945 allowances which Marx testified he had matched with 1945 National Bank of Commerce deposit tickets in evidence but which as we brought out in our opening brief (p. 29) do not match, the Government apparently contends that Marx was testifying on the basis of some 1945 National Bank of Commerce tickets not put in evidence rather than on the basis of the particular 1945 National Bank of Commerce tickets which were put in evidence (Gov't. br. 37). Again they contend these other tickets were present in a box in the courtroom, but there is nothing in the record to support this assertion and the impression was given that only the exhibits in evidence were being summarized.

The Government argues that Marx did not purport to be summarizing deposit tickets in evidence when he was testifying concerning check deposits (Br. 39). However, the excerpts from the testimony and remarks of the Court, set out in our opening brief (pp. 26-28) show clearly that his testimony caused all parties to understand he was summarizing exhibits in evidence and the court so advised the jury with no correction by Marx or Government counsel.

II

Holtberg Invaded The Jury's Function

In response to the second main portion of our argument, to the effect that the testimony of Holtberg invaded the function of the jury, the Government argues that Holtberg simply computed the totals of the allowance slips in evidence without comment of any kind (Br. 44). This is not true. If he had done this and simply stated that the total of all allowance slips in evidence was so many dollars, there would be no objection to his testimony. But he went much further. He testified orally, and also in effect by exhibit 74, that all of these allowances went to the benefit of defendant and not to the guests or employees and constituted taxable income to the defendant. This testimony required, not merely a total of the allowance slips in evidence, but the further inference or speculation that none of the allowances included in this total was

legitimate and was received by a guest or employee. This inference or speculation was not merely an accounting summary of evidence introduced. Nor was it merely a legal or accounting conclusion as to the taxable nature of facts established by the evidence. It was an inference or speculation as to whether the evidence introduced was sufficient to establish that all of these allowances were illegitimate. This was a crucial factual issue in the case and defendant was entitled to have it determined by the jury without having the determination made for them from the stand by a government witness who himself was testifying on the basis of simply hearing the same evidence they did.

In arguing this point, the Government brief again misstates the testimony. On p. 46 it states that Holtberg testified that he did not include any allowance "he knew to be given to employees". His testimony was not qualified or conditioned on what "he knew". It was (R. 821):

> Q. Were any allowances to guests, to employees in any way included in the figure you have used?
>
> A. No, sir."

Various cases are cited on pp. 46 and 47 of the Government's brief as showing that testimony like Holtberg's was permissible. They include cases cited in our opening brief and establish the general rule that an expert can give an accounting summary in these cases.

In *Friedberg v. United States,* 348 U. S. 142, 145, the

Agent stated in answer to a question on cross-examination "there was no evidence available to show there was cash." On redirect he explained this by pointing out the evidence and stating that he could see no reason why he should include cash on hand at the starting point. The Supreme Court upheld this testimony on the ground that the Agent had simply testified that he found no evidence of cash.

Holtberg, here, did not merely summarize evidence showing why he did not include some item. He testified positively that all of the allowances he did include (which were all of the allowances in evidence) were income to the defendant, that defendant had received the benefit of them, and that guests and employees had received no benefit from them.

There is nothing in the opinion in *United States v Johnson,* 319 U.S. 503, indicating that an expert witness for the Government may, simply on the basis of having listened to the evidence, tell the jury that all the allowances went to the benefit of defendant and none went to the benefit of guests and employees, when the records in evidence show the contrary and his conclusion is based on inference or speculation. In the *Johnson* case, as examination of the Circuit Court opinion shows (*United States v. Johnson,* (C.A. 7), 123 F. (2d) 111, 126), the Government accountant was testifying only to summaries of precise entries in exhibits and books of account.

Nor do any of the Circuit Court cases cited by the

Government (br. 47) hold that an expert witness may testify to conclusions on the factual issue before the jury based on his own inferences from hearing the testimony. Those cases are like that of *Remmer v. United States* (C.A. 9), 205 F. (2d) 277, where this Court permitted an expert to tabulate the increase in net worth shown by the evidence. Such a tabulation is by its nature a compilation of specific items of property shown by the evidence and does not involve inference or speculation from which a positive conclusion is testified to which is contrary to the purport of the documents being summarized.

III

Financial Statements And Evidence Based Thereon Improperly Admitted

The Government argument on the financial statements and cross-examination of defendant as to years and items long removed from and having no relevance to the case is a pyramid based on the introduction by the Government of defendant's statements of his 1938 and 1948 net worth, sent to the agents at their request. The financial statements to the banks were proper, it is argued, to show that defendant's statements to the agents were false. Also the cross-examination as to completely irrelevant matters twenty years and more before the indictment period was necessary, it is argued, to show that defendant's 1938 net worth statement was false.

We submit that the pyramid should fall because its foundation was defective. Defendant's statement of 1938 and 1948 net worth was introduced, not by defendant, but by the Government in its case in chief. It was entirely improper and particularly the 1938 net worth statement. These financial statements proved nothing relevant to the issue of whether defendant had received certain specific items of income in the years involved. They were not admissions of any relevant fact. They did not even show any increase in net worth between 1938 and 1948. On the contrary, they showed a decrease. Thus they in no way showed knowledge of what the Government contended was defendant's "true financial position". Their only purpose was to attempt to impeach and discredit defendant on collateral matters as a part of the Government's own case before he ever took the stand or presented any testimony.

The government argues that defendant's objection to these documents on the ground that they were incompetent, irrelevant and immaterial until the *corpus delicti* was established was insufficient because the government contends that it proved the elements of tax evasion even though not by the net worth method. However, these net worth statements made by defendant could be relevant, if at all, only to a net worth case, not to a specific item prosecution. When the Government failed to proceed on a net worth basis it thereby failed to introduce evidence

making defendant's net worth statements relevant and the objection was well taken.

Government counsel seems to argue that any statements given by the defendant to the agents during the investigation that the government thinks can be contradicted by other evidence are admissible as a part of the Government's case irrespective of whether the statements are relevant to the issue sought to be proved. This is contrary to the most basic rules of evidence in criminal cases.

The Government's brief (p. 52) states that on direct examination Corbett testified that he had no experience in operating "rental property" prior to acquiring the hotel and that some of the cross-examination was relevant to disprove such statement. The question asked Corbett actually was whether he had had experience in the operation of any hotel, motel or lodging house. (R. 865). He had, in fact, testified that he had been in the real estate business (R. 863). Nevertheless on the theory that defendant's tax income returns for 1940-1943 showing income from rented real estate (no hotels, motels or lodging house) impeached defendant on this testimony, the Government was permitted to go into these returns in detail (R. 949-963) and to state in final argument that defendant had said he had no prior experience when the returns showed he had all that string of property that he had rented (R. 1093).

When defendant, faced with the introduction by the

Government in its own case of both his statement to the agents of net worth in 1948 on a cost basis and his statement to the banks of net worth on a fair market value basis, tried to explain the fair market value of the Claremont hotel (R. 933-934), the Government seized on this as permitting cross-examination as to defendant's transactions and tax returns for years subsequent to the indictment period. (See Gov't. br. 54). In discussing the Claremont hotel which had been sold on long-term contract after the indictment period, the defendant testified that the government "gets" $200,000 in taxes (R. 935-936). The taxes were payable on the installment basis when payments were made over the period of the contract (R. 993). With its same lack of respect for accuracy where it desires to create an effect, the Government tells this Court that defendant testified that the Government "received" $200,000 in taxes (Gov't. br. 54).

The Government cites *Canton v. United States* (C.A. 8), 226 F. (2d) 313 and *Beatty v. United States* (C.A. 4), 220 F (2d) 681, as supporting the introduction of this evidence. These cases hold that the Government may proceed simultaneously on the net worth and specific items methods. They do not hold that, where no attempt is made to show an increase in net worth between the beginning and end of the indictment period, the Government may introduce financial statements made by defendant for dates having no relationship to the beginning and end of the indictment period and showing no increase in net worth even for the longer period they do cover,

simply for the purpose of discrediting defendant by laying the groundwork for introduction of other evidence also entirely collateral and irrelevant.

Respectfully submitted,

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